80259-9

Supreme Court No. _____

Court of Appeals No. 34901-9-II

SUPREME COURT
OF THE STATE OF WASHINGTON

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,

Plaintiff/Respondent

v.

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,

Defendant/Respondent

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation, and NIPPON STEEL/KAWADA JOINT VENTURE, a Japanese joint venture,

Plaintiffs/Respondents

v.

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture, and SAMSUNG HEAVY INDUSTRIES CO., LTD., a Korean corporation,

Defendants/Appellants

PETITION FOR DISCRETIONARY REVIEW

Daniel J. Dunne, WSBA No. 16999
Leonard J. Feldman, WSBA No. 20961
HELLER EHRMAN LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104-7098
Telephone: (206) 447-4900
Facsimile: (206) 447-0849

Michael H. Salsbury, D.C. Bar No. 365888 80254
Hwan Kim, D.C. Bar No. 463623 80253
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue NW
Washington, D.C. 20036
Telephone: (202) 974-5600
Facsimile: (202) 974-5602

Attorneys for Appellant Samsung Heavy Industries Co., Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

Other Authorities

I. IDENTITY OF PETITIONER

The Petitioner is Samsung Heavy Industries Co., Ltd. ("Samsung"), defendant-appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on April 24, 2007. A copy is attached in the Appendix at A1 though A17.

III. ISSUES PRESENTED FOR REVIEW

Well-settled authority establishes that any questions regarding arbitrability are to be resolved by the arbitrator if an arbitration provision (i) applies broadly to "all disputes," *or* (ii) incorporates arbitration rules that provide that questions regarding arbitrability are to resolved by the arbitrator. Although both requirements are satisfied here, and although the claims asserted by Respondents Nippon Steel-Kawada Bridge, Inc. and Nippon Steel/Kawada Joint Venture (collectively, "NSK") arise out of or in connection with the parties' agreement (or the alleged breach thereof), the Court of Appeals refused to enforce the parties' agreement to arbitrate the threshold question of arbitrability, resolved that question itself, and allowed NSK's claims to proceed in litigation. This Petition for Review presents the following issues:

1. Whether the Court of Appeals' opinion conflicts with decisions of this Court or another decision of the Court of Appeals or

raises issues of substantial public interest because it fails to follow controlling case law requiring that the parties' dispute regarding the arbitrability of NSK's claims be resolved through arbitration before the International Court of Arbitration in Singapore.

2. Whether the Court of Appeals' opinion conflicts with decisions of this Court or another decision of the Court of Appeals or raises issues of substantial public interest because it fails to follow controlling case law requiring that any doubts as to the arbitrability of an issue be resolved in favor of arbitration and because it fails to require that NSK's claims be arbitrated as the parties agreed.

IV. STATEMENT OF THE CASE

A. The Project, The Parties, And Their Agreement To Arbitrate "All Disputes"

This Petition concerns disputes arising out of the construction of the new Tacoma Narrows Bridge (the "Project"), an $849 million public works project for a second highway span between Tacoma and the Kitsap Peninsula. CP 2399. The Washington State Department of Transportation ("WSDOT") engaged Tacoma Narrows Constructors ("TNC"), a joint venture of Bechtel Infrastructure Corporation and Kiewit Pacific Company, to be the general contractor on the Project. CP 1941-42.

In August 2002, TNC issued a $63 million purchase order (the "TNC Purchase Order") to Nippon Steel-Kawada Bridge, Inc. ("NSKB"),

a corporation owned by subsidiaries of Nippon Steel Corporation and Kawada Bridge, Inc., to furnish the steel bridge deck and suspension cables for the Project. CP 2348, ¶ 6. NSKB then subcontracted the supply and delivery of the steel bridge deck to Nippon Steel/Kawada Joint Venture ("NSKJV"), a Japanese joint venture of Nippon Steel and Kawada Bridge. CP 1316.

In November 2002, NSKJV issued a $24.5 million purchase order (the "NSKJV Purchase Order") to Samsung, a corporation registered in the Republic of Korea and a member of the Samsung Group (CP 2348, ¶ 8), to (a) fabricate the bridge deck in Korea from steel supplied by NSK according to plans specified in the purchase order, and (b) load the deck in sections onto vessels arranged by NSKJV for transport to Gig Harbor, Washington. CP 1954, ¶ 47.

As noted above, the NSKJV Purchase Order includes an arbitration provision. Specifically, Section 1, Clause 30 ("Clause 30") provides as follows:

> *All disputes, controversies or differences* which may arise out of or in relation to or in connection with the Purchase Order, or for the breach thereof, shall be amicably settled between the Purchaser [NSKJV] and the Vendor [Samsung]. In case no agreement is reached within a reasonable time, such disputes, controversies or differences shall be finally referred to and settled by arbitration. The arbitration shall take place in the court of the International Chamber of Commerce in Singapore in accordance with the *Rules of Conciliation and Arbitration of the International Chamber of*

> *Commerce.* The Arbitration shall be made before three (3) arbitrators. The award rendered by the arbitrators shall be final and binding upon both parties.

CP 1306 (emphasis added). Critical for present purposes (as will be discussed below), the arbitration provision (i) applies broadly to "all disputes," and (ii) incorporates the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC").

B. NSK's Change Order Claims

After execution of the NSKJV Purchase Order, Samsung learned from NSK that TNC had substantially changed the design for the Project. CP 2349, ¶ 18. As NSK itself later alleged, (a) TNC's design changes were inconsistent with the drawings, plans, and specifications used in the NSKJV Purchase Order for the design of the bridge deck (CP 375, ¶ 8), (b) the changes were "radical in nature, and beyond the reasonable contemplation of an experienced steel bridge fabricator" (CP 385, ¶ 49), and (c) TNC's changes made "fabrication of the steel deck much more costly and time-consuming." (CP 387, ¶ 58).

The bridge redesign altered and considerably increased Samsung's scope of work under the NSKJV Purchase Order and caused substantial additional cost, including overtime and weekend work, for Samsung to complete fabrication of the bridge deck within the schedule of the NSKJV Purchase Order. CP 1320, ¶ A. In June 2004, Samsung submitted a

number of proposed change order requests, totaling in excess of $50 million, pursuant to the terms of the NSKJV Purchase Order. CP 1221-27, 2350, ¶ 23. NSK informed Samsung that it would submit those change order requests (along with several of its own, including a requested markup for NSK for overhead and profit on Samsung's claims) to TNC. CP 2350, ¶ 25. In the meantime, NSK directed Samsung to proceed with the changed scope of work and accelerated work schedule. *Id.* ¶ 26.[1]

Despite its promise to do so, NSK did not promptly pursue additional compensation from TNC on Samsung's behalf. CP 1316-17.[2] When TNC eventually convened a series of meetings in September 2005 to discuss Samsung's concerns, NSK participated briefly and then withdrew. CP 2351-53. TNC and Samsung thereafter met without NSK. CP 2352-53. As a result of those meetings, on September 29, 2005, TNC and Samsung entered into an agreement—the "TNC-Samsung Agreement"—in which TNC directed Samsung to fabricate the bridge deck sections as outlined in Samsung's proposed change order requests and agreed to pay Samsung an additional $29.1 million for completion of

[1] In January 2005, NSK advanced Samsung $12 million in connection with the proposed change orders and promised to resolve Samsung's claims as quickly as possible. CP 376.

[2] Indeed, Samsung later learned that NSK did not formally submit the Samsung change orders to TNC until December 2005. CP 2376, 2389.

Samsung's work on an expedited basis. CP 1236-63, 2353, ¶ 46.[3]

Rather than work cooperatively with TNC and Samsung, NSK filed this lawsuit. CP 8-371. The amended pleading that NSK filed on October 25, 2005, includes the following claims regarding Samsung's change order requests:

- Count One seeks a declaratory judgment concerning NSK's and Samsung's rights and obligations under the NSKJV Purchase Order,
- Counts Two and Three seek damages for alleged breaches by Samsung of the NSKJV Purchase Order, including recovery of the $12 million advanced by NSK in January 2005 and any amounts received under the TNC-Samsung Agreement, and
- Count Four seeks indemnification under the NSKJV Purchase Order for any damages suffered by NSK.

CP 399-402. All of these claims—referred to herein as NSK's "change order claims"—arise out of or relate to the NSKJV Purchase Order or the alleged breach thereof.

C. NSK's Audit Claim

The NSKJV Purchase Order provided in Section 1, Clause 33 ("Clause 33") that Samsung's books and records relating to the Project would be available for review by NSK. CP 1308. On March 30, 2006—

[3] Samsung completed fabrication of the deck sections in June 2006. CP 2417. However, loading of the deck sections on vessels for transport to Gig Harbor was delayed by various performance problems of NSK. *Id.* n.2. On or about November 3, 2006, loading of the final deck sections was finished. At that point, other than potential warranty-related issues, Samsung's work on the Project was completed.

while NSK's change order claims were pending against Samsung—NSK cited this provision and advised Samsung of its desire to have NSK's outside litigation consultants conduct an audit of Samsung's cost records regarding the Project. CP 1827-28.

The parties ultimately agreed that this review would be conducted in Korea, beginning on July 10, 2006. CP 1759-63. Because its business is primarily the result of competitive bidding and that its cost data are sensitive non-public information (CP 1749, 1759), Samsung asked that NSK's consultants execute a confidentiality undertaking, just as TNC previously had agreed to do. CP 1765-70.

Rather than execute such an undertaking (as TNC had), NSK amended its complaint to add a claim seeking to compel Samsung to make its records available to NSK's consultants without any confidentiality protections. CP 1765-67; CP 1945-46, ¶¶ 15-16. Like NSK's change order claims, the audit claim arises out of or relates to the NSKJV Purchase Order (specifically Section 1, Clause 33 of the agreement) or the alleged breach thereof. CP 1945-46, ¶¶ 15-16.

D. The Trial Court's And Court Of Appeals' Arbitration Rulings

When the disputes with NSK could not be settled, Samsung asked that NSK agree to submit the disputes to arbitration. CP 2352, ¶¶ 39-41. When NSK refused, Samsung moved to compel NSK, pursuant to Clause

30, to arbitrate its claims against Samsung before the ICC's International Court of Arbitration ("ICA") in Singapore. CP 1269-82, 1731-38. The trial court rejected Samsung's arguments, and Samsung appealed that ruling pursuant to RAP 2.2(a)(3).

As it had in the trial court, Samsung argued on appeal that the issue of whether NSK's claims are arbitrable must be decided by the arbitrator and not by the court. Samsung also argued that even if the arbitrability issue could properly be decided by a trial court, NSK's claims were in any event subject to mandatory arbitration under Clause 30 of the NSKJV Purchase Order. The Court of Appeals rejected both arguments (App. at A9 – A17), and Samsung thereafter filed this timely petition for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court Of Appeals' Opinion Conflicts With Decisions Of This Court And Another Decision Of The Court Of Appeals And Raises Issues Of Substantial Public Interest Because It Fails To Follow Federal Law Requiring That The Parties' Dispute Regarding The Arbitrability Of NSK's Claims Be Resolved Through Arbitration Before The ICA In Singapore. RAP 13.4(b)(1), (2), And (4).

In moving to compel arbitration, Samsung invoked Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (the "FAA"), and the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention"). CP 1269-82. There is no dispute that the NSKJV

Purchase Order is subject to the FAA and the Convention. Article II of the Convention provides:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The FAA incorporates the Convention into U.S. law and directs that the Convention be applied in actions pending in state as well as federal courts. 9 U.S.C. § 201.

Courts in this state have scrupulously followed this mandate. In *Zuver v. Airtouch Commc'ns Inc.*, 153 Wn.2d 293, 103 P.2d 753 (2004), for example, this Court held that "[b]oth state and federal courts *must* enforce this body of substantive arbitrability law." *Id.* at 301 (emphasis added). In *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 711, 959 P.2d 1140 (1998), the Court of Appeals similarly held that "Chapter 2 [of the FAA] mandates that both state and federal courts of the United States enforce the Convention." *Id.* at 710.

Because the FAA and the Convention are controlling here, the question of arbitrability is resolved by an arbitrator if the parties evidence a clear and unmistakable intent to that effect. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

The parties may evidence such an intent "by entering into a[n] [arbitration] agreement that (1) employs the 'any and all' language . . . *or* (2) expressly incorporates the provisions of [a tribunal that requires questions of arbitrability to be decided in arbitration]." *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 55 (2d Cir. 2001) (emphasis added).

Shaw Group Inc. v. Triplefine International Corp., 322 F.3d 115 (2d Cir. 2003), is instructive. The parties there agreed to refer "all disputes . . . concerning or arising under" the agreement in question to "the International Chamber of Commerce . . . in accordance with the rules and procedures of International Arbitration." *Id.* at 121-22 (ellipsis in original). Because ICC Rule 6.2 provides for the arbitrator to address questions of arbitrability, the court ruled that both the "all disputes" language and the designation of arbitration under ICC rules evidenced the parties' clear intent that questions of arbitrability were to be decided by the arbitrator. *Shaw Group*, 322 F.3d at 122.

Similarly, in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989), the parties agreed that (i) all disputes arising out their agreement would be settled by binding arbitration, and that (ii) the arbitration would be conducted "in accordance with the rules of arbitration of the [ICC]." Noting that parties may "agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits

of the dispute," the court ruled that the parties clearly and unmistakably agreed to delegate decisions concerning the arbitrability of disputes to the arbitrator "[b]y contracting to have all disputes resolved according to the Rules of the ICC." *Id.*

Here, as in *Shaw Group, Apollo Computers,* and numerous other opinions applying the FAA,[4] Clause 30 of the NSKJV Purchase Order clearly evidences the intent of the parties to have the issue of arbitration decided by an arbitrator. It does that in two separate and independent ways. First, the Purchase Order states that "[a]ll disputes" shall be referred to arbitration. Second, the Purchase Order mandates that such arbitration is to proceed "in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce." Accordingly, for either or both of these reasons, the parties' dispute regarding the arbitrability of NSK's claims must be resolved through arbitration before the ICA in Singapore rather than in state court.[5]

---

[4] *See, e.g., China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 286-88 (3d Cir. 2003) (finding court has authority to decide only whether contract is void when arbitration clause designates arbitration under international rules requiring arbitrator to decide arbitrability of dispute); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991) ("[W]hen parties contract to have all disputes resolved according to the Rules of the ICC . . . they agree to let the arbitrator decide questions of arbitrability.").

[5] Samsung recognizes that the final paragraph of Clause 30 allows a dispute between NSK and Samsung to be "dealt with jointly" with a dispute between NSK and TNC if the dispute with TNC "touches or concerns the Subcontract Work" involving Samsung. CP 1306. As discussed below, this paragraph does not apply to the present

(footnote continued...)

It is equally clear that discretionary review is warranted here. The Court of Appeals' opinion conflicts with this Court's opinion in *Zuver* and with the Court of Appeals' opinion in *Kamaya* because it fails to properly apply controlling federal law to issues arising under the FAA and the Convention. While referring to the "general rule" that questions of arbitrability are typically a matter for the court as opposed to the arbitrator to decide, the Court of Appeals completely ignored *Shaw Group* and the other FAA cases cited above that create an exception to this general rule where the parties' arbitration agreement requires either that "all disputes" must be arbitrated or that arbitration must proceed under the rules of the ICC—both of which appear in the NSKJV Purchase Order. Discretionary review is therefore appropriate under RAP 13.4(b)(1)-(2).

In addition, the Court of Appeals' opinion raises issues of substantial public interest related to international comity and commerce, such that discretionary review is also appropriate under RAP 13.4(b)(4). As the United States Supreme Court explained in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974), the enforcement of international arbitration agreements is critical to fostering

---

(continued from previous page)
action because NSK's dispute with TNC does not "touch and concern" NSK's dispute with Samsung. Regardless, the final paragraph of Clause 30 only addresses the question of whether the parties' dispute is arbitrable and is not relevant to the threshold issue of whether arbitrability is to be decided by the court or the arbitrator.

international commercial agreements.[6] Division I echoed this important statement of public policy in *Kamaya*, stating:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts[.] We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

91 Wn. App. at 713 n.2 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444 (1985)) (alteration in original).

By holding that the issue of arbitrability in this dispute must be resolved by a court in Washington, the Court of Appeals established a dangerous precedent for the enforceability of future disputes under the FAA, the Convention, and the ICC that could deter foreign entities from doing business in Washington. For this reason too, discretionary review is warranted here.

---

[6] The Court noted, for example, that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [orderliness and predictability in international transactions], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S. at 516-17, 94 S. Ct. at 2456.

B. The Court Of Appeals' Opinion Conflicts With Decisions Of This Court And Another Decision Of The Court Of Appeals And Raises Issues Of Substantial Public Interest Because It Fails To Resolve Any Doubts In Favor Of Arbitration And It Fails To Require That NSK's Claims Be Arbitrated As The Parties Agreed. RAP 13.4(b)(1), (2), And (4).

Both federal and state courts have repeatedly held that the FAA's provisions reflect a "'liberal federal policy favoring arbitration agreements.'" *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983)). This Court similarly has held that "[c]ourts must indulge every presumption in favor of arbitration." *Zuver*, 153 Wn.2d at 301 (internal quotation marks omitted). Moreover, "'[t]he federal policy favoring arbitration is even stronger in the context of international transactions.'" *Kamaya*, 91 Wn. App. at 714 (quoting *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1063 (2d Cir. 1993)).

Here, there can be no serious question that NSK's claims against Samsung are encompassed by the broad language of Clause 30. NSK's claims are "disputes, controversies, or differences" that arise out of the NSKJV Purchase Order and are therefore within the scope of Clause 30. The Court of Appeals eviscerated the parties' agreement to arbitrate such

disputes by focusing instead on the final paragraph of Clause 30, which allows a dispute between NSK and Samsung to be "dealt with jointly" with a dispute between NSK and TNC if the dispute with TNC "touches or concerns the Subcontract Work" involving Samsung.[7] The Court of Appeals found that under this paragraph, NSK's claims were not subject to the requirement that "[a]ll disputes" be resolved through arbitration in Singapore, but rather that Samsung was required to join in litigation between TNC and NSK, wherever it might be pending.

Although Samsung strongly disagrees with the Court of Appeals' interpretation of the final paragraph of Clause 30, this Court need not decide whether the Court of Appeals is or is not correct. That is because, as this Court noted in *Zuver*, "[c]ourts must indulge *every presumption* in favor or arbitration." 153 Wn.2d at 301 (emphasis added; internal quotation marks omitted). Thus, a dispute is subject to arbitration under the FAA "unless it can be said 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the

[7] The entire text of the final paragraph states as follows: "If any dispute arises in connection with the TNC Contract [the TNC Purchase Order] and the Purchaser [NSKJV] is of the opinion that such dispute touches or concerns the Subcontract Work, then the Purchaser [NSKJV] may by notice in writing to the Vendor [Samsung] require that any such dispute under this Purchase Order shall be dealt with jointly with the dispute under the TNC Contract. The Vendor shall be bound in like manners [sic] as the Purchaser by the award or decision made in connection with such joint dispute." CP 1306. Clause 30 is quoted in its entirety at pages 8-9 of the Court of Appeals' opinion. *See* App. at A8-A9.

asserted dispute." *Kamaya*, 91 Wn. App. at 714 (quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993)). This Court, therefore, need only decide whether the final paragraph of Clause 30 clearly is not susceptible of *any* interpretation that requires arbitration.

The Court of Appeals failed to properly resolve any doubts in favor of arbitration, and its opinion therefore conflicts with decisions of this Court and another decision of the Court of Appeals. The most plausible interpretation of the final paragraph of Clause 30 is that NSK and Samsung intended to arbitrate their disputes if they could not be settled, but that NSK could protect itself against inconsistent outcomes if disputes arose between TNC and NSK that concerned Samsung's work on the Project. CP 1279. In that event, the outcome of the TNC-NSK dispute would be binding in any arbitration between NSK and Samsung, and the dispute between NSK and Samsung would still be arbitrated as agreed.

If the parties had intended that in certain circumstances their disputes would be resolved through litigation in Washington or that Samsung would be a party to any dispute resolution process involving TNC and NSK, they could have stated this clearly and unambiguously.[8]

[8] Samsung notes in this regard that the TNC Purchase Order, which pre-dated the NSKJV Purchase Order and to which NSKB is a party, expressly states that disputes may be resolved through litigation in the Thurston County Superior Court. CP 329-30. *(footnote continued...)*

Instead, the final paragraph of Clause 30 states only that if a dispute arises in connection with the TNC Purchase Order that concerns Samsung's work on the Project, then NSKJV may require that such a dispute "be dealt with jointly with the dispute under the TNC Contract" and Samsung would be bound by the result in the same manner as NSKJV. Nothing in the phrase "dealt with jointly" states or suggests that Samsung necessarily would be a party to any dispute resolution process between TNC and NSK. Nothing in the phrase "dealt with jointly" precludes Samsung's understanding that the intent of this paragraph was for any such outcome to be binding in a subsequent arbitration between NSKJV and Samsung.[9]

Nor does the Court of Appeals' ruling make practical sense. NSK has raised seven claims against TNC, and TNC has asserted four counterclaims against NSK. App. at A14 - A15. As explained in the

---

(continued from previous page)
Thus, if NSK, the drafter of Clause 30, had desired that outcome, it knew how to draft Clause 30 to accomplish it.

[9] Moreover, even if the Court of Appeals' interpretation of Clause 30 were accepted, the final paragraph of Clause 30 is not applicable here because NSK's claims do not "touch or concern" the TNC-NSK disputes. RP 05/05/2006, at 21-23. NSK's audit claim has no corollary either in the issues between TNC and NSK, where to Samsung's knowledge no audit claims have been asserted, or in any issues between TNC and Samsung. Much the same is true with regard to the change order claims. NSK's amended complaint does *not* seek recovery on the proposed change orders that NSK submitted to TNC (which included Samsung's change order claims that are the subject of the NSK-Samsung dispute). Instead, NSK seeks in its amended complaint to rescind the TNC Purchase Order, to recover any draws TNC made against NSK's letter of credit, and to recover damages for TNC's alleged interference with the NSKJV Purchase Order (by settling with Samsung so that the Project could proceed). CP 1979-82.

preceding footnote, none of those claims is based on Samsung's performance under the NSKJV Purchase Order. Moreover, TNC and Samsung have already settled their differences. There is no reason to force Samsung to litigate its dispute with NSK in that proceeding, particularly when NSK and Samsung are both foreign entities that clearly intended their dispute to be resolved through arbitration in Singapore.

It is equally clear that the Court of Appeals' perfunctory analysis (App. at A13) conflicts with this Court's decision in *Zuver*, which states that "[c]ourts must indulge every presumption in favor or arbitration." *Zuver*, 153 Wn.2d at 301 (internal quotation marks omitted). It also conflicts with *Kamaya*, which confirms—as many cases do—that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," particularly in the context of international commercial transactions. *Kamaya*, 91 Wn. App. at 714 (internal quotation marks omitted); *Mitsubishi Motors*, 473 U.S. at 629, 105 S. Ct. at 3355. While paying lip service to these requirements, the Court of Appeals failed to address in any meaningful way the critical question of why or how the final paragraph of Clause 30 is not susceptible to Samsung's interpretation (as set forth above). Discretionary review is therefore appropriate under RAP 13.4(b)(1)-(2).

Here too, the Court of Appeals' opinion raises issues of substantial public concern and therefore warrants discretionary review under RAP 13.4(b)(4) as well. Federal courts have explained that "[t]he reasons for th[e] strong pro-arbitration policy [underlying the FAA] are to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 906 (11th Cir. 2006) (internal quotation marks omitted). Washington courts agree.[10] Despite this body of law, the Court of Appeals would force Samsung and NSK, two foreign entities, to engage in expensive and lengthy litigation of an international dispute in Washington. The decision also opens the courthouse doors in this state to lawsuits by other parties who, like NSK, wish to avoid arbitration of such disputes.

In addition to raising serious issues regarding potential forum shopping and congestion, the Court of Appeals' opinion raises substantial issues regarding international comity and commerce. As the United States

---

[10] *See, e.g., Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (finding "strong public policy in this state favoring arbitration of disputes" and holding "[a]mong other things, arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation"); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765-66, 934 P.2d 731 (1997) ("There is a strong public policy in Washington state favoring arbitration of disputes. The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system." (citation omitted)).

Supreme Court explained:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors, 473 U.S. at 629, 105 S. Ct. at 3355. Absent this Court's review, the Court of Appeals' opinion threatens to create dangerous uncertainty for foreign companies who wish to enter into commercial transactions with citizens of this state, but who also wish to ensure that disputes arising out of such transactions will be subject to arbitration before the ICC. For this reason as well, the Court should grant discretionary review.

VI. CONCLUSION

For the foregoing reasons, this Court should grant discretionary review under RAP 13.4(b)(1), (2), and (4).

RESPECTFULLY SUBMITTED this 25th day of May, 2007.

HELLER EHRMAN LLP

By _____
Leonard J. Feldman
WSBA No. 20961

CHADBOURNE & PARKE LLP

By _____
Michael H. Salsbury
D.C. Bar No. 365888
by email authorization

Attorneys for Appellant Samsung Heavy Industries Co., Ltd

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TACOMA NARROWS CONSTRUCTORS, A Washington joint venture, Appellant, v. NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation, Respondent,	No. 34901-9-II consolidated with
NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation, and NIPPON STEEL/KAWADA JOINT VENTURE, a Japanese joint venture, Respondent, v. TACOMA NARROWS CONSTRUCTORS, a Washington joint venture, and SAMSUNG HEAVY INDUSTRIES CO., LTD, a Korean corporation, Appellant.	No. 35241-9-II PUBLISHED OPINION

Hunt, J. — Samsung Heavy Industries, Ltd., appeals two pre-trial rulings: (1) the trial court's denial of Samsung's motion to stay proceedings and to compel arbitration of Nippon Steel-Kawada Bridge, Inc., and Nippon Steel/Kawada Joint Venture's (collectively "NSK") claims against Samsung; and (2) the trial court's granting of NSK's motion for leave to amend its

complaint, asserting a new claim against Samsung. Holding that the NSK-Samsung contract does not compel arbitration of this dispute,[1] we affirm.

FACTS

I. THE PARTIES & CONTRACTS

This litigation involves a series of contracts and sub contracts to construct a second span of the Tacoma Narrows Bridge, a state public works project. The Washington State Department of Transportation engaged Tacoma Narrows Constructors, a joint venture of Bechtel Infrastructure Corporation and Kiewit Pacific Company, as general contractor for the bridge construction.

In August 2002, Tacoma Narrows Constructors contracted with Nippon Steel-Kawada Bridge[2] to furnish and to deliver steel bridge and suspension cables for the Tacoma Narrows Bridge. This contract also required Nippon Steel-Kawada Bridge to execute a Letter of Credit, benefiting Tacoma Narrows Constructors, in the event of Nippon Steel-Kawada Bridge's breach of performance. The contract amount was approximately $63 million.

Nippon Steel-Kawada Bridge subcontracted fabrication and delivery of the steel bridge deck to its sister company, Nippon Steel/Kawada Joint Venture ("NSK Joint Venture").[3]

In November 2002, NSK Joint Venture issued a Purchase Order to Samsung Heavy Industries, Ltd.[4] Under their contract, Samsung promised (1) to fabricate the bridge deck in

---

[1] Because we stayed the trial court proceedings pending this appeal, Samsung's appeal from the trial court's denial of a stay is moot.

[2] Nippon Steel-Kawada Bridge, Inc., is a California corporation owned by parent companies Nippon Steel Corporation and Kawada Bridge, Inc.

[3] Nippon Steel/Kawada Joint Venture ("NSK Joint Venture") is a Japanese venture.

Korea from steel supplied by NSK according to plans specified in the NSK Joint Venture-Samsung contract, (2) to load the completed bridge decks onto vessels that NSK Joint Venture supplied for transport, and (3) to allow NSK Joint Venture to audit Samsung's fabrication and other performance costs.[5] This contract amount was approximately $24.6 million.

II. CHANGE ORDERS AND NSK JOINT VENTURE-SAMSUNG LETTER OF AGREEMENT

Shortly after execution of the NSK Joint Venture-Samsung contract, Tacoma Narrows Constructors began issuing redesign orders for the bridge decks. The bridge deck redesign altered and considerably increased Samsung's scope of work under the NSK Joint Venture-Samsung contract, including substantial additional costs and additional time. During this time, Samsung continued to work on the bridge decks because both the Tacoma Narrows Constructors-Nippon Steel-Kawada Bridge contract and the NSK Joint Venture-Samsung contract required work to proceed, regardless of disputes.

Samsung then submitted numerous change order requests under the NSK Joint Venture-Samsung contract terms. NSK Joint Venture said it would forward these requests to Tacoma Narrows Constructors. Around this time, Samsung threatened to cease work, or considerably slowed work, on the bridge decks.

In order to secure Samsung's performance under the NSK Joint Venture-Samsung contract, and thereby perform its obligations under the Tacoma Narrows Constructors-Nippon Steel-Kawada Bridge contract, NSK Joint Venture entered into a Letter of Agreement with

---

[4] Samsung Heavy Industries, Ltd. is a corporation registered in the Republic of Korea.

[5] This audit clause entitled NSK Joint Venture to audit Samsung anytime during normal business hours within three years of the last acceptance date of the contract.

Samsung in January 2005. This Letter of Agreement set a new performance schedule for Samsung, and NSK Joint Venture agreed to pay Samsung an additional $12 million. Nonetheless, Samsung apparently continued to delay performance because of continued disputes about its change order requests.

A December 2004 mediation involving Tacoma Narrows Constructors, Nippon Steel-Kawada Bridge, NSK Joint Venture, and Samsung failed to resolve the dispute.

III. LITIGATION

A. "June" Case

In June 2005, Tacoma Narrows Constructors served Nippon Steel-Kawada Bridge with a complaint (the "June" case),[6] but it did not file this complaint in superior court until September 20, the day after Nippon Steel-Kawada Bridge and NSK Joint Venture filed a separate action against Tacoma Narrows Constructors and Samsung.

B. "September" Case

On September 19, 2005, Nippon Steel-Kawada Bridge and NSK Joint Venture (collectively "NSK") filed a complaint against both Tacoma Narrows Constructors and Samsung in Thurston County Superior Court, the "September" case.[7] NSK simultaneously moved for a temporary restraining order to prevent Samsung from ceasing work on the bridge decks.

---

[6] The Thurston County Superior Court case number is 05-2-01889; thus, the report of proceedings refers to it as the "1889 case." The parties often refer to this "1889 case" as the "June case," even though the complaint in this case was not filed until September. Nonetheless, for clarity, we will use the parties' term.

[7] The Thurston County Superior Court case number is 05-2-01877; thus, the report of proceedings refers to it as the "1877 case." The parties often refer to this "1877 case" as the "September case." We will use the parties' term.

On September 29, Samsung and Tacoma Narrows Constructors met, seeking resolution and continued work on the bridge decks; they included neither Nippon Steel-Kawada Bridge nor NSK Joint Venture in this meeting. Samsung and Tacoma Narrows Constructors entered into an agreement - the "TNC-Samsung Settlement Agreement." Under this agreement, Tacoma Narrows Constructors agreed to Samsung's proposed change order requests, and Tacoma Narrows Constructors agreed to pay Samsung an additional $29.1 million.

To pay Samsung, Tacoma Narrows Constructors drew approximately $12.9 million against Nippon Steel-Kawada Bridge's letter of credit guaranteeing its performance. Tacoma Narrows Constructors made this draw without Nippon Steel-Kawada Bridge's permission.

Samsung moved to dismiss NSK's claims for lack of personal jurisdiction. The trial court held it had personal jurisdiction over Samsung and denied the motion on February 10, 2006. Shortly thereafter, Samsung answered NSK's claims and asserted counterclaims.

On March 15, Samsung moved to stay the proceedings and to compel arbitration under the NSK Joint Venture-Samsung contract. On May 5, the trial court heard argument and denied Samsung's motion, concluding that NSK's claims against Samsung are not arbitrable under the terms of the NSK Joint Venture-Samsung contract because the issues "evolved around the same facts" as those in the ongoing NSK-Tacoma Narrows Constructors disputes being litigated in superior court.

C. "Audit Claim"

Around this time, in March 2006, NSK Joint Venture notified Samsung that it intended to exercise its NSK Joint Venture-Samsung contract audit rights to obtain actual cost information about Samsung's change order requests. Although the NSK Joint Venture-Samsung contract

granted NSK Joint Venture the right to audit Samsung's fabrication and other performance costs, according to NSK Joint Venture, Samsung repeatedly refused these requests.

In response to Samsung's audit refusals, NSK moved for leave to amend its complaint in the "September" case, specifically, to add a claim for Samsung's breach of contract in refusing NSK Joint Venture's request to audit Samsung's bridge-deck fabrication costs (the "audit claim") under Section 33 of the NSK Joint Venture-Samsung contract. Samsung objected that (1) under RAP 7.2, the trial court lacked jurisdiction to rule on the motion because the case was pending on appeal; and (2) NSK was attempting to use Section 33 to begin early discovery for the pending lawsuits. The trial court granted NSK's motion to amend, finding (1) the "audit claim" was "connected" to a NSK-Tacoma Narrows Constructors dispute and, thus, did not require arbitration under Section 30 of the contract; and (2) RAP 7.2 does not apply to interlocutory appeals and, therefore, the trial court had jurisdiction to decide these claims.

IV. INTERLOCUTORY APPEAL

Samsung appeals (1) the trial court's order denying Samsung's motions to compel arbitration and to stay proceedings, and (2) the trial court's order granting NSK's motion for leave to amend its complaint.

Our court commissioner granted Samsung's motion to stay the trial court proceedings for both the June and September cases until we resolve this appeal.

ANALYSIS

I. SAMSUNG'S MOTION TO STAY TRIAL PROCEEDINGS AND TO COMPEL ARBITRATION

In denying Samsung's motion to compel arbitration and to stay the trial proceedings, the trial court focused on two primary issues: (1) whether NSK Joint Venture and Samsung had a

clear agreement to arbitrate all disputes between them; and (2) whether the NSK-Samsung disputes were "connected" to the NSK-Tacoma Narrows Constructors disputes, thus invoking paragraph four of Section 30 of the NSK Joint Venture-Samsung contract governing dispute resolution.

Samsung argues that the trial court erred in ruling that: (1) NSK Joint Venture and Samsung did not have a clear agreement to arbitrate *all* disputes that arose under the NSK Joint Venture-Samsung contract;[8] (2) instead, paragraph four of Section 30 of the contract applies - NSK Joint Venture may "require" that any "dispute aris[ing] in connection with the TNC Contract" that, in NSK Joint Venture's opinion, "touches or concerns the Subcontract Work" under the NSK Joint Venture-Samsung contract "be dealt with jointly with the dispute under the TNC [Tacoma Narrows Constructors] Contract"; Clerk's Papers (CP) at 1304, (3) the NSK Joint Venture-Samsung disputes were connected with and involved the same facts as the NSK-Tacoma Narrows Constructors disputes; and (4) therefore, NSK Joint Venture could by-pass arbitration and instead require the NSK Joint Venture-Samsung disputes to be addressed jointly with the NSK-Tacoma Narrows Constructors disputes in the superior court litigation.

In response, NSK argues that the trial court correctly ruled that the NSK Joint Venture-Samsung contract's arbitration provision did not apply to NSK's claims against Samsung here.[9] We disagree with Samsung and agree with the trial court.

---

[8] The NSK Joint Venture-Samsung contract is alternatively referenced as the "Purchase Order."

[9] More specifically, NSK contends that (1) it was proper for the trial court, not an arbitrator, to determine the scope of the contract's arbitration clause; (2) using the basic cannons of contract interpretation, the trial court properly found that (a) NSK Joint Venture and Samsung did not intend to arbitrate disputes that concerned NSK-Tacoma Narrows Constructors disputes, and (b) NSK had unilateral discretion to make this determination; (3) NSK properly invoked paragraph

A. Dispute Resolution

The dispute resolution provision, Section 30, of the NSK Joint Venture-Samsung contract, provides:

> All disputes, controversies, or differences which may arise out of or in relation to or in connection with the [NSK Joint Venture-Samsung] Purchase Order, or for the breach thereof, shall be amicably settled between the Purchaser [NSK Joint Venture] and the Vendor [Samsung]. In case no agreement is reached within a reasonable time, such disputes, controversies or differences shall be finally referred to and settled by arbitration. The arbitration shall take place in the court of International Chamber of Commerce in Singapore in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The Arbitration shall be made by three (3) arbitrators. The award rendered by the arbitrators shall be final and binding upon both parties.
> Notwithstanding the foregoing, all questions, disputes or differences between the Purchaser [NSK Joint Venture] and the Vendor [Samsung] arising as a result of disputes between or among WSDOT, TNC [Tacoma Narrows Constructors], NSKB and/or the Purchaser relating to the Vendor's performance of the Subcontract Work under the Purchase Order or involving claims by WSDOT, TNC [Tacoma Narrows Constructors], and/or NSKB [Nippon Steel-Kawada Bridge] against the Purchaser resulting from the Subcontract Work shall be governed in accordance with the laws of the State of Washington, the United States of America.
> The Vendor [Samsung] shall, upon the Purchaser's [NSK Joint Venture] written request, fully assist the Purchaser in the proceedings of the arbitration or litigation arising between or among WSDOT, TNC [Tacoma Narrows Constructors], NSKB [Nippon Steel-Kawada Bridge] and/or the Purchaser relating to the Vendor's performance of the Subcontract Work or otherwise related to the Vendor's actions under the Purchase Order. In such case, the Vendor shall be bound by the award of such arbitration or the judgment of such litigation, as the case may be.
> If any dispute arises in connection with the TNC [Tacoma Narrows Constructors] Contract and the Purchaser [NSK Joint Venture] is of the opinion that such dispute touches or concerns the Subcontract Work, then the Purchaser may by notice in writing to the Vendor [Samsung] require that any such dispute under this

---

four, Section 30, of the contract and properly determined, within its discretion, that the NSK claims against Tacoma Narrows Constructors concerned NSK's claims against Samsung; and (4) the trial court properly found that arbitration was not required here (a) because the NSK Joint Venture-Samsung contract provides for arbitration only where the arbitrator's decision would be final and binding, and (b) because any litigation outcome between Tacoma Narrows Constructors and NSK would be final, arbitration cannot bind NSK as to its claims against Samsung.

> Purchase Order shall be dealt with jointly with the dispute under the TNC Contract. The Vendor shall be bound in like manners as the Purchaser by the award or decision made in connection with such joint dispute.

CP at 1304.

Samsung argues that this dispute-resolution provision invokes the following controlling policies: (1) The Federal Arbitration Act, recognizing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Chapter 2, 9 U.S.C., requires NSK to submit the NSK-Samsung claims to arbitration; (2) federal and Washington law have a liberal policy of construing arbitration clauses in favor of arbitration; and (3) the question of arbitrability is itself a dispute that arose under the NSK Joint Venture-Samsung contract and, therefore, NSK must arbitrate it, too. Again, we disagree.

B. The Court Determines Arbitrability

Chapter 2 of the Federal Arbitration Act[10] mandates that both state and federal United States courts enforce the international Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. §§ 201, 205. "Article II of the Convention imposes a mandatory duty on the courts of a Contracting State to recognize, and enforce an agreement to arbitrate unless the agreement is 'null and void, inoperative or incapable of being performed.'" *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992) (citing 9 U.S.C.A. § 201 note).

The general provisions of the Federal Arbitration Act, articulated under Chapter 1, apply to cases brought under Chapter 2, but only to the extent that Chapter 1 "is not in conflict with

[10] Chapter 2 of the Federal Arbitration Act ratified the international Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. §§ 201-08.

[Chapter 2] or the Convention as ratified by the United States." 9 U.S.C. § 208. Because all parties in this dispute are from Contracting States to the Convention,[11] Chapter 2 of the Federal Arbitration Act, and Chapter 1 to the extent that it does not conflict with Chapter 2, governs the arbitrability of the parties' claims. *See McDermott Int'l, Inc. v. Lloyds Underwriters*, 944 F.2d 1119, 1208 (5th Cir. 1991).

The general rule is that whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) (Whether the parties have agreed to arbitrate and, if so, what issues they have agreed to arbitrate are "matter[s] to be determined by the court on the basis of the contract entered into by the parties.")[12] "The party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention." *Associated Milk Dealers, Inc. v. Milk Drivers Union, etc.*, 422 F.2d 546, 550 (7th Cir. 1970). Like all questions of law, we review questions of arbitrability de novo. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995); *ACF Prop. Mgmt., Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387, *review denied*, 122 Wn.2d 1019 (1993).

Four principles guide us when determining whether the parties agreed to submit a particular dispute to arbitration:

> (1) the duty to submit a matter to arbitration arises from the contract itself; (2) the question of whether parties have agreed to arbitrate a dispute is a judicial one

[11] *See* 9 U.S.C. § 201.

[12] *See also United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); *Metal Products Workers Union, Local 1645 v. Torrington Co.*, 358 F.2d 103, 105 (2d Cir. 1966).

> unless the parties clearly provide otherwise; (3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue; and (4) arbitration of disputes is favored by the courts.

W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987) (citing *AT & T Techs., Inc. v. Comm. Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986)).

Contrary to Samsung's contention, a plain reading of the dispute resolution clause here (Section 30, of the NSK Joint Venture-Samsung contract) does not clearly state that the parties agreed to submit the question of arbitrability to an arbitrator. Although Samsung argues that the phrase "all disputes" implicitly encompasses any arbitrability questions, such general "all disputes" arbitration phrases are not an express delegation of the issue of arbitrability to the arbitrator; on the contrary, federal courts have consistently held that questions of arbitrability must be "a clear and unmistakable delegation." *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999). Therefore, Samsung's argument that the general "all disputes" arbitration clause covers questions of arbitrability fails, and Samsung fails to show that NSK Joint Venture and Samsung clearly intended questions of arbitrability to be arbitrable.

Adhering to the general rule, *supra,* we hold that a court, not an arbitrator, is the appropriate entity to determine the question of whether the parties agreed to submit a specific claim to arbitration, unless there is a clear agreement to the contrary, which is not present here.

C. Arbitrability of Specific Claims

In determining the scope of the contract's dispute resolution provision, Section 30, the trial court ruled that Samsung and NSK Joint Venture agreed to arbitrate all disputes that arose

under the NSK Joint Venture-Samsung contract, as long as those disputes were not "connected" with or based on the same facts involved in any dispute arising under the Tacoma Narrows Constructors-Nippon Steel-Kawada Bridge contract. Samsung argues that the trial court erroneously interpreted Section 30 because (1) paragraph four's phrase, "[a]ny such dispute under this Purchase Order *shall be dealt with jointly* with the dispute under the TNC[-NSKB] Contract," does not clearly require litigation, Appellant's Reply Brief at 17-18; and (2) the trial court should have utilized the interpretation principle favoring arbitration: "that the parties' intentions 'are generously construed as to issues of arbitrability,' with a dispute being arbitral 'unless it can be said with positive assurance' that [the] arbitration clause is not susceptible of an interpretation that covers the dispute.' *Kaymaya Co., Ltd v. American Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714 [959 P.2d 1140] (1998), quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739 [862 P.2d 602] (1993)." Appellant's Reply Brief at 19. In sum, Samsung argues that, because paragraph four does not clearly say *how* the Tacoma Narrows Constructors-connected disputes shall be dealt with jointly, the trial court should have ruled in favor of arbitrability. We disagree.

1. Standard of review

We review de novo trial court's interpretation of a contract, including an arbitration clause. *Petersen v. Schafer*, 42 Wn. App. 281, 285, 709 P.2d 813 (1985), *rev. denied*, 105 Wn.2d 1011 (1986). In interpreting an arbitration clause, the intentions of the parties as expressed in the agreement control, but "those intentions are generously construed as to issues of arbitrability." *W.A. Botting*, 47 Wn. App. at 684 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). To rule

that a particular dispute is not arbitrable under an arbitration agreement "[t]he court must be able to say 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *ML Park Place*, 71 Wn. App. at 739 (citing *Local Union No. 77, Int'l Bhd. of Elec. Workers v. Pub. Util. Dist. No. 1, Grays Harbor County*, 40 Wn. App. 61, 65, 696 P.2d 1264 (1958). Such is not the case here.

2. "In connection with" and "touches or concerns"

Agreeing with the trial court, we hold that paragraph four of section 30 of the NSK Joint Venture-Samsung contract clearly expresses the parties' intent to resolve "jointly" any pending disputes "in connection with the [Tacoma Narrows Constructors] Contract" that, in the opinion of NSK Joint Venture, "touches or concerns [Samsung's] Subcontract Work."

Samsung next argues that (1) even if the trial court correctly interpreted Section 30, the disputes between Samsung and NSK Joint Venture, and the disputes between NSK and Tacoma Narrows Constructors, are not the same disputes; and (2) mere overlap of facts is not enough to invoke the paragraph four arbitration exception. This argument also fails.

The trial court reviewed NSK's first amended complaint in the "September" case, Tacoma Narrows Constructors' complaint in the "June" case, and all parties' counterclaims, which included the following claims and counterclaims:

"SEPTEMBER" CASE: NSK V. TACOMA NARROWS CONSTRUCTORS & SAMSUNG

NSK's Complaint and Claims Against Samsung:

(1) declaratory judgment of the parties' rights under the NSK Joint Venture-Samsung contract

(2) damages for Samsung's anticipatory repudiation of the NSK Joint Venture-Samsung contract and NSK Joint Venture-Samsung letter of agreement, based on Samsung's threats to cease work

(3) damages for unjust enrichment, based on Samsung's acceptance of Tacoma Narrows Constructors' $12.9 million draw on Nippon Steel-Kawada Bridge's Letter of Credit

(4) indemnification by Samsung, under the NSK Joint Venture-Samsung contract, whereby Samsung indemnifies NSK for any liabilities incurred because of Samsung's repudiation or breach, including Tacoma Narrows Constructors' draw on Nippon Steel-Kawada Bridge's Letter of Credit

NSK's Complaint and Claims Against TNC:

(5) declaratory judgment of the parties' rights under the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract

(6) damages and rescission of the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract based on Tacoma Narrows Constructors' fraudulent representations about the initial deck designs

(7) damages and rescission of the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract because Tacoma Narrows Constructors repudiated the contract when it demanded radical new deck designs

(8) damages for Tacoma Narrows Constructors' breach of contract via breach of the implied covenant of good faith and fair dealing, because Tacoma Narrows Constructors intended to submit radical new deck designs when it entered into the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract with Nippon Steel-Kawada Bridge

(9) damages and rescission of the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract for failure of the parties to have a "meeting of the minds" because Tacoma Narrows Constructors intended to submit radical redesigns and Nippon Steel-Kawada Bridge did not expect any redesigns

(10) damages for Tacoma Narrows Constructors' tortious interference with the NSK Joint Venture-Samsung contract, based on Tacoma Narrows Constructors' offer to Samsung to pay Samsung, directly, an additional $25 million in order for Samsung to resume fabrication and to deliver the bridge decks on schedule

(11) damages for Tacoma Narrows Constructors' wrongful draft of $12.9 million on Nippon Steel-Kawada Bridge's Letter of Credit, because to obtain the draft, Tacoma Narrows Constructors misrepresented to Nippon Steel-Kawada Bridge's bank that Nippon Steel-Kawada Bridge had breached the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract

Samsung's Answer and Counterclaims Against NSK:[13]

(12) declaratory judgment that NSK's claims against Samsung must be arbitrated

[13] Tacoma Narrows Constructors' Answer to NSK's amended complaint does not allege any counterclaims, but it did state that its counterclaims were already asserted in its prior lawsuit, i.e., the "June" case.

(13) damages for NSK Joint Venture's breach of contract because NSK Joint Venture failed to compensate Samsung for the additional material costs incurred as a result of Tacoma Narrows Constructors' deck redesigns

(14) damages for NSK Joint Venture's breach of contract because NSK Joint Venture failed to compensate Samsung for the additional fabrication costs incurred as a result of Tacoma Narrows Constructors' deck redesigns

(15) damages for NSK Joint Venture's unjust enrichment as a result of Samsung's fabrication in accordance with Tacoma Narrows Constructors' deck redesign

"JUNE" CASE: TACOMA NARROWS CONSTRUCTORS V. NSK

Tacoma Narrows Constructors' Complaint and Claims Against NSK:

(1): declaratory judgment of Tacoma Narrows Constructors' and NSKB's rights and obligations under their Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract

(2) specific performance that Nippon Steel-Kawada Bridge fabricate and deliver the bridge decks in accordance with the agreed delivery schedule

(3) injunctive relief seeking to enforce specific performance and delivery

(4) damages for Nippon Steel-Kawada Bridge's repudiation of the Nippon Steel-Kawada Bridge - Tacoma Narrows Constructors contract, based on Nippon Steel-Kawada Bridge's Letter of Agreement with Samsung, agreeing to a different delivery schedule than the one in Nippon Steel-Kawada Bridge's contract with Tacoma Narrows Constructors, and Nippon Steel-Kawada Bridge's failure to pay undisputed money owed to Samsung, thereby causing Samsung to delay performance

NSK's Answer and Counterclaims against Tacoma Narrows Constructors:

NSK asserts the same claims against Tacoma Narrows Constructors that it alleged in NSK's "September" complaint against Tacoma Narrows Constructors. *See* above.

NSK Joint Venture and Samsung agreed under Section 30 to arbitrate only those disputes, controversies, or differences that are unconnected to a NSK Joint Venture-Tacoma Narrows Constructors dispute. These superior court claims and counterclaims reveal a high degree of connection among them, and also between them and NSK Joint Venture's audit claim against Samsung. The trial court found that all of these claims revolved "around the same facts, the same issues, perhaps being approached from a different side of the proverbial coin." We agree

with and adopt the trial court's reasoning. We hold, therefore, that the trial court did not err in denying Samsung's motion to compel arbitration.[14]

II. AMENDED COMPLAINT -- NSK'S ADDITION OF "AUDIT" CLAIM

Samsung next argues that (1) NSK Joint Venture's "audit claim" is subject to arbitration under Section 30 of the NSK Joint Venture-Samsung contract; (2) the trial court erred in finding that NSK Joint Venture's "audit claim" was "connected" to a NSK-Tacoma Narrows Constructors dispute and, therefore, did not require arbitration; and (3) the trial court erred in allowing NSK Joint Venture to amend its complaint to add its "audit claim."

We agree with the trial court that (1) the "audit claim" factually related to the claims between NSK and Tacoma Narrows Constructors in the pending litigation and (2) thus, paragraph four of Section 30 of the contract requires that such disputes be resolved jointly. The "audit claim" is clearly connected with the following claims underlying the court litigation: (1) NSK Joint Venture's need to know the costs underlying Samsung's change-order requests, (2) the effect of the design changes on the cost and performance of Samsung's bridge-deck fabrication, (3) Tacoma Narrow Constructors' entering into a side agreement with Samsung to change the production schedule and to pay Samsung additional funds, (4) Tacoma Narrows Constructors' withdrawal against Nippon Steel-Kawada Bridge's Letter of Credit to pay additional compensation to Samsung, (5) Nippon Steel-Kawada Bridge's lawsuit against Tacoma Narrows Constructors for wrongful withdrawal on the letter of credit when Nippon Steel-Kawada Bridge claimed it did not breach the contract or otherwise trigger draws on its letter of

[14] Because we have both stayed the proceedings below pending this appeal and affirmed the trial court's denial of Samsung's motion to compel arbitration, Samsung's appeal of the trial court's denial of its motion to stay is moot and we need not address it.

credit, and (6) Nippon Steel-Kawada Bridge's claim that Samsung knew the extra money it received from Tacoma Narrows Constructors wrongfully came from Nippon Steel-Kawada Bridge's letter of credit.

Under its contract with Samsung, NSK Joint Venture may require that its audit claim be resolved "jointly" with other pending disputes under the Tacoma Narrows Constructors' contract because, in its opinion, its audit claim "touches or concerns the Subcontract Work." See explanation above. Because the parties' connected claims are being addressed in superior court, the audit claim can also be resolved jointly in superior court, together with the other related claims.[15]

Affirmed.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.

[15] We further note that these other claims and their parties are not subject to the NSK Joint Venture-Samsung contract and arbitration clause. Therefore, the forum for these claims is superior court, not arbitration in Hong Kong, which would be the venue for claims subject to arbitration under the NSK Joint Venture-Samsung contract.

DECLARATION OF SERVICE

I, Malissa Tracey, an employee with the law firm of HELLER EHRMAN LLP, hereby certify under penalty of perjury under the laws of the State of Washington that on May 23, 2007, I caused to be served upon counsel of record at the addresses and in the manner described below, the foregoing Petition for Discretionary Review and this Declaration of Service.

ATTORNEYS FOR PLAINTIFFS

Service Via Hand Delivery

Michael Himes
Rolf B. Johnson
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Service Via Fax and U.S. Mail

Margaret K. Pfeiffer (*pro hac vice*)
Bruce W. Hickey (*pro hac vice*)
Sullivan & Cromwell LLP
1701 Pennsylvania Avenue, NW
Washington, D.C. 20006
Phone: (202) 956-7500
Fax: (202) 293-6330

ATTORNEYS FOR DEFENDANTS

Service Via Fax and U.S. Mail
David Buoncristiani (*pro hac vice*)
Paul Wilson Bering (*pro hac vice*)
Thelen Reid Brown Raysman & Steiner LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3601
Phone: (415) 371-1200
Fax: (415) 371-1211

Service Via Hand Delivery
Thomas Ahearne
Jeremy R. Larson
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Phone: (206) 447-4400
Fax: (206) 447-9700

Signed at Seattle, Washington this 23rd day of May, 2007.

Malissa Tracey

SE 2212001 v1
5/23/07 9:42 AM (42737.0001)